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Nos. 80-2046 and 80-2057

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MISSISSIPPI POWER & LIGHT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a public utility that sells its services to various agencies of the federal government is subject to the provisions of Exec. Order No. 11246 and implementing regulations.

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OPINIONS BELOW

The opinion of the court of appeals in
2046 and No. 80-2057 (80-2046 Pet. Ap
80-2057 Pet. App. A1-A16) is reported
899. The opinion of the district court in
(80-2046 Pet. App. 1a-28a) is reporte

Supp. 705. The opinion of the district
80-2057 (80-2057 Pet. App. B1-B4)
reported at 20 Fair Empl. Prac. Cas. (1

An earlier opinion of the court of a
80-2046 (80-2046 Pet. App. 165a-215a
at 553 F.2d 459. An earlier opinion o
appeals in No. 80-2057 is reported at
The initial opinion of the district cou
2046 (80-2046 Pet. App. 100a-162a)
reported at 8 Fair Empl. Prac. Cas.
The initial opinion of the district cou
2057 is unofficially reported at 10 Fai
Cas. 1084.

JURISDICTION

The judgment of the court of appeal
on March 6, 1981. The petitions for a
rari were filed on June 3, 1981. The
this Court is invoked under 28 U.S.C. 12

STATEMENT

1. Section 202 of Exec. Order No. 1
Reg. 12319 (1965), as amended by Ex
11375, 32 Fed. Reg. 14303 (1967), re
federal government contracts include
hibiting the contractor from discrimi
ployment on the basis of race, color, r
national origin, and requiring the cont
affirmative action to ensure that appli
ployed, and that employees are treat
ployment, without regard to their race,
sex, or national origin" (see 80-2046
56a). Section 201 of the Executive O
Pet. App. 53a) directs the Secretary
"adopt such rules and regulations a
orders as he deems necessary and
achieve the purposes" of the Order.

The Secretary has issued a re
60-1.3; 80-2046 Pet. App. 73a) th
ment contract as "any agreem
thereof between any contracting
son for the furnishing of supplie
The term 'service' * * * includes
the following services: Utility
tary's regulations also provide th
of the Order, the equal opportu
considered to be part of every
contract required by the order
* * * to include such a clause
physically incorporated in such co
or not the contract between the
tractor is written." 41 C.F.R.
Pet. App. 84a.

Both the Executive Order itself
ing regulations require a contra
Secretary access to information
the contractor's compliance. Sec
Executive Order requires a co
access to his books, records, a
contracting agency and the Sec
purposes of investigation to ascer
[the] rules, regulations, and or
Secretary]" (see 80-2046 Pet.
regulations provide (41 C.F.R. 6
App. 85a):

> Each * * * contractor *
> cess during normal business
> for the purpose of conducti
> reviews and inspecting and
> records, accounts, and other
> relevant to the matter und
> pertinent to compliance w

Order and the rules and
gated pursuant thereto *
obtained in this manner sh
connection with the adminis
the administration of the
1964 (as amended) and in
purposes of the Order and

2. a. Petitioner in No. 80-
Public Service Inc. (NOPSI), is
sells electric power to consumers
the Mississippi River in New
and distributes natural gas to c
New Orleans (80-2046 Pet. App.
natural gas and electricity pursu
by the City Council (*ibid.*). It
with permits to supply New Orle
and to supply the east bank of th
(*id.* at 103a-104a). Consumers
obtain electricity only from NO
natural gas only from NOPSI o
where NOPSI has specifically ag
pliers through pipelines built
NOPSI (*ibid.*).

Federal agencies in New Orl
chasers of utilities from NOPS
105a-118a). In 1973, NOPSI
$2,680,000 from the federal g
services (*id.* at 114a). Nine
paid NOPSI more than $10,00
services from 1965 to 1973
Federal agencies, like other c

---

[1] The largest user is the Michoud
National Aeronautics and Space Ad
approximately $1.4 million for utili
2046 Pet. App. 106a-107a).

monthly and pay for the
(*id.* at 119a).

NOPSI supplies 22 fed
under written agreement
133a); six other federal
ties under less formal a
Although some of the wr
cuted before October 24,
Exec. Order No. 11246, a
rate schedules in 1973
133a).[2] Nevertheless, nor
expressly contains the n
quired by Exec. Order N
NOPSI refused to sign a
cause it contained that
128a, 131a, 140a).

In 1969, the federal g
conduct a review of NO
its compliance with Ex
2046 Pet. App. 136a-13
General Services Admini
its conclusion that the e
quired by Exec. Order
all NOPSI contracts wit
the contracts were writ
Pet. App. 143a). In Ju
Labor, through the Offic
pliance (OFCC), concur
it had determined that

---

[2] The Executive Order ap
of contracts entered into be
60-1.3, 80-2046 Pet. App. 7
tion 209(a)(6), 80-2046 Pet

[3] A few of the agreem
clauses required by earlier E
Pet. App. 120a, 121a, 122a.

tractor subject to the Ex
144a).

NOPSI informed the
not permit a review to de
the Executive Order (80-
The United States then
States District Court fo
Louisiana. It sought an i
to comply with the Exe
access to NOPSI's premis
whether NOPSI was in c

b. Petitioner in No. 8(
Light Co. (MP&L), is a
the Mississippi Public Se
electricity in a large pa
Mississippi (*United Sta
Light Co.*, 10 Fair Emp
1085 (1975)). MP&L
electricity in that part
of its franchise, it must
requesting it, including
(*ibid.*). MP&L concedes
alternative source of
States v. *Mississippi Po*
480, 481 (5th Cir. 1977)).

MP&L has written ar
furnish electrical service
to federal agencies at 1
Fair Empl. Prac. Cas. (1
of the written contracts
effective date of Exec

---

[4] One contract—that for
Court House—was executed
Executive Order (10 Fair E
The contract proposed by th
opportunity clause required

have been amende
date (*ibid.*).[5] Nor
contains the equal
Executive Order.

The governmen
in 1972 and 1973
views (10 Fair E
1088). Although
MP&L by letter t
subject to the p
MP&L denied the
on the ground th
with the terms
regulations (*id.*
then sued in t
for the Southern
as it had against
MP&L to comply
obtain access to
determine whethe
Pet. App. A3).

3. In each cas
utility company t
to the requirem
(80-2046 Pet. Ap
(BNA) at 1091)
from "[f]ailing o
Order 11246," sp
the utilities perm
tent of their con

MP&L returned th
posed contract, MP&
which did not conta
vision for access to

[5] See note 2, *supra*

their premises an
164a; 10 Fair E
Both district cou
determine the ext
the Executive O
Fair Empl. Prac.

The court of a
decisions, modify
the injunctive ma
cause "the enforc
be better carried
pliance agencies"
United States v.
F.2d 480, 484 (5t
Exec. Order No. 1
idential power un
ministrative Servi
and Title VII of
U.S.C. 2000e *et s*
see 553 F.2d at 4
district courts' fi
government contr
were therefore su
though they had
by it (80-2046 Fe
483). Finally, th
the utilities' pape
the Fourth Amer
195a; 553 F.2d
NOPSI and MP&L
government contr

---

[6] The court cautio
faith negotiations be
cided herein are pr
2046 Pet. App. 202a

sent[ed]" t
Pet. App. 1
Judge Cl
"neither ut
the meanin
App. 212a)
and MP&L
supply util
within thei
irrespective
rangements
stances of
tomers, not
(*id.* at 211
that both t
regulations
at 204a n.1
This Cou
writ of cer
further con
Inc., [436
Service, In
The court
trict courts
the Supren
Public Ser
1978). Ea
decision, a
Pet. App.
ing jurisd
could be er
The util
peals reaf
Order and
the utilitie

441 U.S. 281 (1979), called these conclusions into question (80-2046 Pet. App. 37a-42a). The court held, however, that the district courts had not fully analyzed the Fourth Amendment question. It eschewed reliance on implied consent (*id.* at 43a-44a) and remanded for further findings on the question whether the inspections were reasonable within *Marshall* v. *Barlow's, Inc.*, *supra*. Specifically, the court of appeals ruled that while the inspections were properly authorized by law and sufficiently limited in scope, the district courts should have "examin[ed] * * * how the agency chose to initiate th[e] particular search[es]" to determine whether the agencies were following "reasonable" or "neutral" criteria (80-2046 Pet. App. 46a). The court also invited the district courts to consider "other questions relevant to the reasonableness of the proposed search under the fourth amendment" (*id.* at 47a).

ARGUMENT

1. Petitioners contend (*e.g.*, 80-2046 Pet. 14-23; 80-2057 Pet. 8-12) that Exec. Order No. 11246 is not a valid exercise of presidential authority. For several reasons, this contention is incorrect. Moreover, this is not an appropriate case for the Court to decide this important question.

a. In 1941, President Roosevelt issued the first Executive Order barring discrimination by government contractors, and every President since has continued that prohibition in some form. See 80-2046 Pet. App. 178a-180a; *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 168-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971). Even petitioner NOPSI acknowledges that Con-

gress has not repudiated this 40-year-old, consistent presidential practice (see 80-2046 Pet. 20). Every appellate court that has considered the question has held that the President has the authority to apply Exec. Order No. 11246 to government contractors. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra; Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Southern Illinois Builders Association* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *EEOC* v. *AT&T*, 556 F.2d 167, 175 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Uniroyal* v. *Marshall*, 579 F.2d 1060 (7th Cir. 1978); *St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612 (10th Cir. 1979); *AFL-CIO* v. *Kahn*, 618 F.2d 784, 790-792 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979).[7]

One statutory source of presidential authority for Exec. Order No. 11246 is the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 *et seq.* That Act deals with, among other things, government procurement of services; in particular, it is intended to establish an "economical and efficient system for * * * the procurement * * * of * * * services" (40 U.S.C. 471(a)). The Act empowers the President to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of [the] Act * * *" (40 U.S.C. 486(a)). As the

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[7] *Liberty Mutual Insurance Co.* v. *Friedman*, 639 F.2d 164 (4th Cir. 1981), on which petitioners rely, is not to the contrary. See note 12, *infra*.

Third Circuit explained, Exec. Order No. 11246 directly promotes the Act's objectives (*Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra*, 442 F.2d at 170-171):

> [I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. * * * In direct procurement the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects.

Moreover, employment discrimination is now illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Court has recognized that a firm's engaging in illegal employment discrimination can increase its costs; "[f]or example, when a company complies with a backpay award resulting from a finding of employment discrimination in violation of Title VII * * * it pays twice for work that was performed only once." *NAACP* v. *FPC*, 425 U.S. 662, 668 (1976). Even the possibility of litigation can increase an employer's costs. Similarly, discrimination, like other unfair employment practices, is "a prolific cause of [industrial] strife" (*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937)) that can disrupt a contractor's business. By impairing morale and dissipating good will, as well as by causing more obvious forms of disruption, discriminatory practices can increase an employer's costs. Thus Exec. Order No. 11246 promotes efficient and economical procurement by requiring government contractors to

avoid an important potential source of wasteful ar unnecessary costs.[8]

Congress ratified Exec. Order No. 11246 and i predecessors when it enacted Title VII in 1964, ar again when it amended Title VII in 1972. For e ample, Congress integrated the Executive Order e forcement program into the scheme it designed enforce Title VII. Title VII provided (42 U.S. (1970 ed.) 2000e-8(d)):

> * * * Where an employer is required by [t predecessor of Executive Order 11246], * * * by rules or regulations issued thereunder, to fi reports relating to his employment practic with any Federal agency or committee, and is substantially in compliance with such requir ments, the [Equal Employment Opportunity Commission shall not require him to file add tional reports * * *.

The 1972 amendments provided for other feder agencies to exchange information with the EEO and designated the Secretary of Labor as a memb of the Equal Employment Opportunity Coordinati Council (see 42 U.S.C. 2000e-8(d), 2000e-14); t purpose of the Council was to improve coordinati between the Executive Order enforcement progra

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[8] In addition, courts have indicated that the Federal Pr erty and Administrative Services Act authorizes the Pre dent to attempt to eliminate employment discrimination wi out directly linking that objective to the cost or quality goods. *Rossetti Contracting Co.* v. *Brennan*, 508 F.2d 10 1045 n.18 (7th Cir. 1975); *Northeast Construction Co. Romney*, 485 F.2d 752, 760 (D.C. Cir. 1973). See also *Libe Mutual Insurance Co.* v. *Friedman*, *supra*, 639 F.2d at 172-1 (Butzner, J., concurring in part and dissenting in part).

and the EEOC (see 118 Cong. Rec. 13
(1972)).[9] As even petitioner NOPSI appears
cede (see 80-2046 Pet. 20), nothing in Title V
amendments was intended to repudiate the E
Order program. For example, in 1972 Cong
jected an effort to make Title VII the exclus
eral remedy for employment discriminatio
Alexander v. *Gardner-Denver Co.*, 415 U.S. 3
(1974); Senator Williams, the floor manager
1972 amendments to Title VII, explained (11
Rec. 3372 (1972)):

---

[9] Petitioner NOPSI cites (80-2046 Pet. 18-19) C
deletion of a provision that would have expressly a
the President to "take such action as may be appr
against "unlawful employment practice[s] * * * in
tion with the performance of a [government] contra
but NOPSI quotes only a small portion of the de
plaining Congress's action. The colloquy engaged in
resentative Celler, who offered the amendment,
demonstrates that Congress intended to endorse the
order program (110 Cong. Rec. 2575 (1964)):

> MR. CELLER. And will the gentleman not
> that the deletion of the language by the amendn
> not have any effect upon existing Presidential
>
> MR. POFF. Of course, the striking of langu
> a bill could not in any way impair existing law.
>
> MR. CELLER. And it does not limit it and
> broaden it. It remains intact as it is now.
>
> MR. POFF. That is true.
>
> * * *
>
> MR. QUIE. Even though I support this am
> is it not true that the President has this autho
> now, judging from actions being taken by the
> of late?
>
> MR. CELLER. The President has the author

The House then adopted the amendment.

> Mr. President, this amendment can be bar enforcement of the Government compliance program, at least, in part. believe that the Senate would do that the votes we have taken in the past 2 to to continue that program in full fo effect.

b. In *Dames & Moore* v. *Regan*, No. (July 2, 1981), slip op. 19-20, the Court sta even if a statute does not "directly author presidential action, "we cannot ignore the tenor of Congress' legislation in [an] area i to determine whether the President is acting at least with the acceptance of Congress. * * enactment of legislation closely related to t tion of the President's authority in a partic which evinces legislative intent to accord th dent broad discretion may be considered to 'measures on independent presidential respo *Youngstown* [*Sheet & Tube Co.* v. *Sawyer*], [579,] 637 [(1952)] (Jackson, J., concurri least this is so where there is no contrary i of legislative intent and when * * * there is of congressional acquiescence in conduct of engaged in by the President."

At the very least, Exec. Order No. 1124 predecessors fit this pattern. Congress has to the President broad authority in the procurement (see page 11, *supra*). Since 1 ing a period of intense legislative activi area of civil rights, Presidents have with tion asserted the authority to prohibit disc among government contractors. Congres aware of the Executive Order program and indicated a desire to abrogate it; on the

Congress has indisputably accepted it
the Executive Order program is speci
ized by statute (see pages 11-15, *supra*
it is not, it clearly represents " 'a system
executive practice, long pursued to the
Congress' " and a " 'long-continued p
to and acquiesced in by Congress * *
Moore v. *Regan*, *supra*, slip op. 28, qu
town Sheet & Tube Co. v. *Sawyer*, *su*
at 610-611 (Frankfurter, J., concurrin
States v. *Midwest Oil Co.*, 236 U.S. 45
For these reasons, Exec. Order No. 1
the President's authority.

It is true that this case, unlike *Da*
does not involve the President's power i
tions. But the Court has long recogni
concerning government procurement,
less dramatic than foreign affairs, are
unfit subject for judicial intervention.

---

[10] For example, Senators Clark and Case
sponsors of Title VII, offered a memorandum
VII (see *International Brotherhood of Tea*
States, 431 U.S. 324, 351-352 (1977)), in w
(110 Cong. Rec. 7215 (1964)):

> The President's Committee on Equal
> portunity was created by [predecesso
> Order 11246]. * * * It presently superv
> tration of an equal employment oppo
> with respect to * * * contractors and s
> construction financed with Federal fin
> Title VII, in its present form, has no
> sponsibilities of the committee or on t
> sessed by the President or Federal ager
> ing law to deal with racial discriminat
> of Federal Government employment a
> tracts.

straint of those who administer
purchasing would constitute a b
judicial practice * * *." *Perkins* v.
310 U.S. 113, 127-128 (1940); see,
v. *Stake*, 447 U.S. 429, 439 n.12 (1
utive is to be supervised in this a
of Congress to do so. See *Perkins* v.
supra, 310 U.S. at 128-130. Accor
consistent acceptance, and ratific
standing executive practice, engage
grant of discretion, is entitled to g

c. Finally, this is not a suitable
to consider the validity of Exec.
The Executive Order is concerned
contractors' employment practices;
sions are designed to give effect
quirement that contractors not d
petitioners have chosen to challeng
early stage, before their employme
been specifically drawn into questio

For at least two reasons, the Cou
sider a challenge to the Executiv
case is in this posture. First, b
employment practices have not be
record lacks information that s
Court's decision on the validity

---

[11] For this reason, petitioner NOPSI
Order and its implementing regulation
tional "race and sex conscious remedi
11-14) plainly does not warrant revie
have been imposed on NOPSI. In any
ment in support of this contention is es
of its view that the Executive Order (
regulation incorporating it in all gove
at 14) exceed the authority of the Ex

Order. For example, the fact
practices in a particular area
illustrate the connection betwee
inefficiency in government pr
Contractors Association of Eas
Secretary of Labor, supra, 442
Liberty Mutual Insurance Co. v
169, 170 (4th Cir. 1981).

Second, particularly in deali
presidential authority, the Cou
* * * the very questions necess
case" (*Dames & Moore* v. *Rega*
Only two issues are necessarily
at this time: the validity of the
tioners permit compliance inspec
of certain administrative obli
duty to examine their employme
mit a report on them (see 41 C.
on petitioners by virtue of the
that the Executive Order applies
objection to the compliance insp
review at this time. See
While petitioners contend gener
subject to the Executive Orde
cifically complained about any
requirements imposed by the
menting regulations; thus no ot
been brought into focus by the
even if petitioners were to obj
istrative requirements, the Pr
impose such requirements on g
in order to gather information
ment practices is even clearer
regulate those practices; the re
to determine whether certain

interfere with objectives, st
omy, that he is authorized t

2. Petitioners' principal
are not subject to the Exe
have never agreed to be bo
tack the validity of 41 C.F
vides that the equal opp
incorporated in governmen
exceptions not relevant he
physically incorporated in s
or not the contract * * *

---

[12] Petitioners' assertion that
with *Liberty Mutual Insuranc*
incorrect. In *Liberty Mutual,*
President lacks the authority t
to certain employers who are w
ment *subcontractors*—in partic
vided workers' compensation i
tractors, when that insurance
worked on government contra
639 F.2d at 171). The court c
which the Executive Order wa
tractors—including the court o
ent case—noting that in such c
between the efficiency and eco
Property and Administrative
tions imposed on federal contr
* * * is more readily surmise
shown in relation to the insura
the instant case" (*id.* at 170-1
Circuit, while caviling at some
Circuit's decision in this case (
25), expressly distinguished
this case on the ground that "
* * * a sufficient efficiency/eco
plication of the Executive
demonstrable" here (639 F.2d
Thus there is no reason to b
would reach a different result

Pet. 6-10; 80-2057 Pe
without merit. Given
Order, it is entirely co
and its statutory bases
it.

The courts below agr
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e.g., 80-2046 Pet. App.
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80-2046 Pet. App. 7
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& Co. v. *Seamans*, 45
1971); *G.L. Christia*
States, 312 F.2d 418,
Russell Motor Car Co
514, 524 (1923); *De*
United States, 284 U
Boat Corp. v. *United*
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[13] Petitioners rely hea
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18 U.S.C. 1905. It hel
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Pet. 23-29; 80-2

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Dames & Moore v.
Tube Co. v. *Sawyer*,

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272 U.S. 52, 117 (19
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Pet. App. 46a)

other questions relevant to the reasonableness of the proposed search * * *." (80-2046 Pet. App. 47a). The district courts had not previously considered the question of reasonableness, since they appeared to conclude that the inspections were not within the Fourth Amendment. It would be inappropriate for this Court to consider that question in the first instance, particularly when, because of the district courts' approach, the record on the question of reasonableness has not been developed.

Moreover, in remanding the case the court of appeals suggested that *Marshall* v. *Barlow's, Inc.*, *supra*, "may have cast doubt on * * * the implied consent concept" (80-2046 Pet. App. 44a) that it had relied on when it first heard the case (see 80-2046 Pet. App. 193a-195a) and that at least one district court had invoked on remand (see 80-2057 Pet. App. B3). But since the court of appeals' decision, this Court has decided *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981), in which it said that the Fourth Amendment may not require a warrant when a search is prescribed as part of a regulatory program "and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes" (slip op. 5-6). In this respect, *Donovan* cited and followed *United States* v. *Biswell*, 406 U.S. 311 (1972), where the Court held that "[w]hen a [gun] dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection" (*id.* at 316).

Petitioners have entered into contracts with the government under terms that expressly subjected them to inspections; this is an even clearer form of consent than that shown by one who enters a pervasively regulated business or accepts a federal license. Thus, under *Donovan* v. *Dewey* and *Biswell*, petitioners' assertion that the inspection violates the Fourth Amendment appears to be incorrect. In any event, on remand the district courts will have an opportunity to consider the consent issue in light of *Donovan*. Until they have done so, and their decisions are reviewed by the court of appeals, this Court should not decide whether the proposed inspections comply with the Fourth Amendment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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